



Dealing with Unacceptable Performance Under Chapters 43 & 75

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DELRS 2011

Civil Service Reform Act of 1978

- Linked all of the reasons an appraisal was needed into one required annual assessment
 - Basic Pay
 - Performance Awards
 - Promotions
 - Reduction in Force Retention
- Required establishment of rating criteria on most important functions in advance of completing the rating

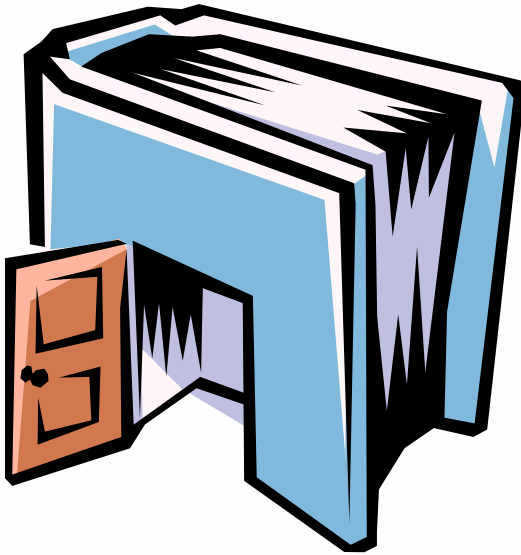
CSRA of 1978

- Created a specific procedure for dealing with unacceptable performance
 - Required that employee have chance to improve before action taken
 - Possible results of an unacceptable rating: reassignment, demotion, or removal
 - Lower burden of proof on appeal than under 5 USC Chapter 75
 - MSPB has no authority to mitigate penalty

Merit Principles and Performance

- 5 USC 2301(b)(6) – Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards

In and Out of NSPS



- 432 coverage
 - Those who never converted to NSPS
 - Upon transition to pre-NSPS systems
- Under NSPS (2009 ratings)
 - .3% rated Unacceptable
 - 1.3% rated Fair

MSPB Adverse Action Statistics

- 1995 – 8,785 appeals
 - 146 (2%) performance-based
 - 4,302 (49%) disciplinary
- 2007 – 6,305 appeals
 - 142 (2%) performance-based
 - 2,746 (44%) disciplinary
- 2008 – 5,917 appeals
 - 121 (2%) performance-based
 - 2,778 (47%) disciplinary
- 2009 – 6,265 appeals
 - 119 (2%) performance-based
 - 2,456 (39%) disciplinary
- 2010 – 6,536 appeals
 - 98 (1%) performance-based
 - 2,668 (41%) disciplinary

Human Capital Survey

- Q. 23 on the survey

- “In my work unit, steps are taken to deal with a poor performer who cannot or will not improve.”

- Responses (positive/negative)

- 2002 – 25%/46%
 - 2004 – 27.4%/41%
 - 2006 – 28.6%/39%
 - 2008 – 29.6%/37.3%
 - 2010 – 34.4%/37.6%



<http://www.fedview.opm.gov/2010/Published/>

Why Don't Managers Like Them?

- The logic of letting the employee try to perform when he/she can see that they can't is troubling
- Cases take a long time and an inordinate amount of time and attention
- He/she is the only witness – tend to be very personal
- They don't see the “system” supporting them



Why Don't HR Specialists Like Them?

- Have to stick our necks out early by reviewing the elements and standards
- Cases take a long time and the supervisor needs a lot of attention
- You really only have one witness
- They are the worst cases to lose



Why Don't MSPB Judges Like Them?

- Appellants generally are not bad people who have done something terribly wrong
- Appellant only gets one chance to improve
- Only one unacceptable critical element rating makes summary rating unacceptable
- Scope of review is extremely limited



So, Why Do One?

- Leaner organizations can't afford to maintain non-performers
- Unacceptable performance left unresolved is a problem with awards, selections for assignments and training, basic pay, reduction-in-force
- Other employees' morale and motivation are affected if not corrected
- Merit Principle about retaining employees based of the adequacy of their performance and taking action if employees cannot or will not improve their performance

Process

Definitions (5 CFR 430.203)

■ Critical element

- Work assignment or responsibility of such importance that unacceptable performance in that element would result in a determination that the overall performance is unacceptable

■ Performance standard

- Management-approved expression of the performance threshold(s), requirement(s), or expectation(s) that must be met to be appraised at a particular level of performance
- A performance standard may include, but is not limited to, quality, quantity, timeliness, and manner of performance

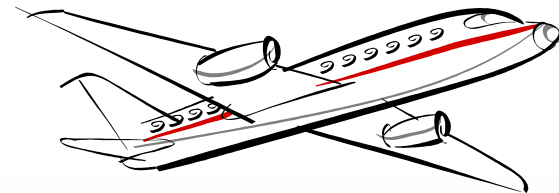
More Definitions (5 CFR 430.203)

- Agency performance plans may include non-critical elements and additional elements
 - Neither may be the basis of a 432 action



Critical Element

- A function/responsibility/duty that is so important that the person can't succeed in the job without it
- “Taking off” and “landing” functions
- From a management perspective, typically try to cover as much of the job as possible – not just a list of duties from the position description



Performance Standards

- Yardsticks by which performance is measured



- Express how the rater would know
 - If performance was successful or not, or
 - How the supervisor could distinguish between fully successful performance and performance that exceeded that level
- Should be based on information the supervisor has available through observation, reports, automated systems, etc.

Summary Rating Pattern Options

■ (5 CFR 430.208(d))

Level 1 = Unacceptable
Level 3 = Fully Successful
Level 5 = Outstanding

	1	2	3	4	5
A	X		X		
B	X		X		X
C	X		X	X	
D	X	X	X		
E	X		X	X	X
F	X	X	X		X
G	X	X	X	X	
H	X	X	X	X	X

432 and Levels of Performance

- Fully Successful (Level 3)
 - Required level, can have different name
 - Denotes fully meeting all requirements
- Marginal or Minimally Successful (Level 2)
 - Optional level, can have different name
 - Denotes failure to fully meet all requirements, but errors/omissions are not major, not repeated once guidance is provided, etc.
- Unacceptable (Level 1)
 - Required level, can have different name
 - Denotes significant deficiencies

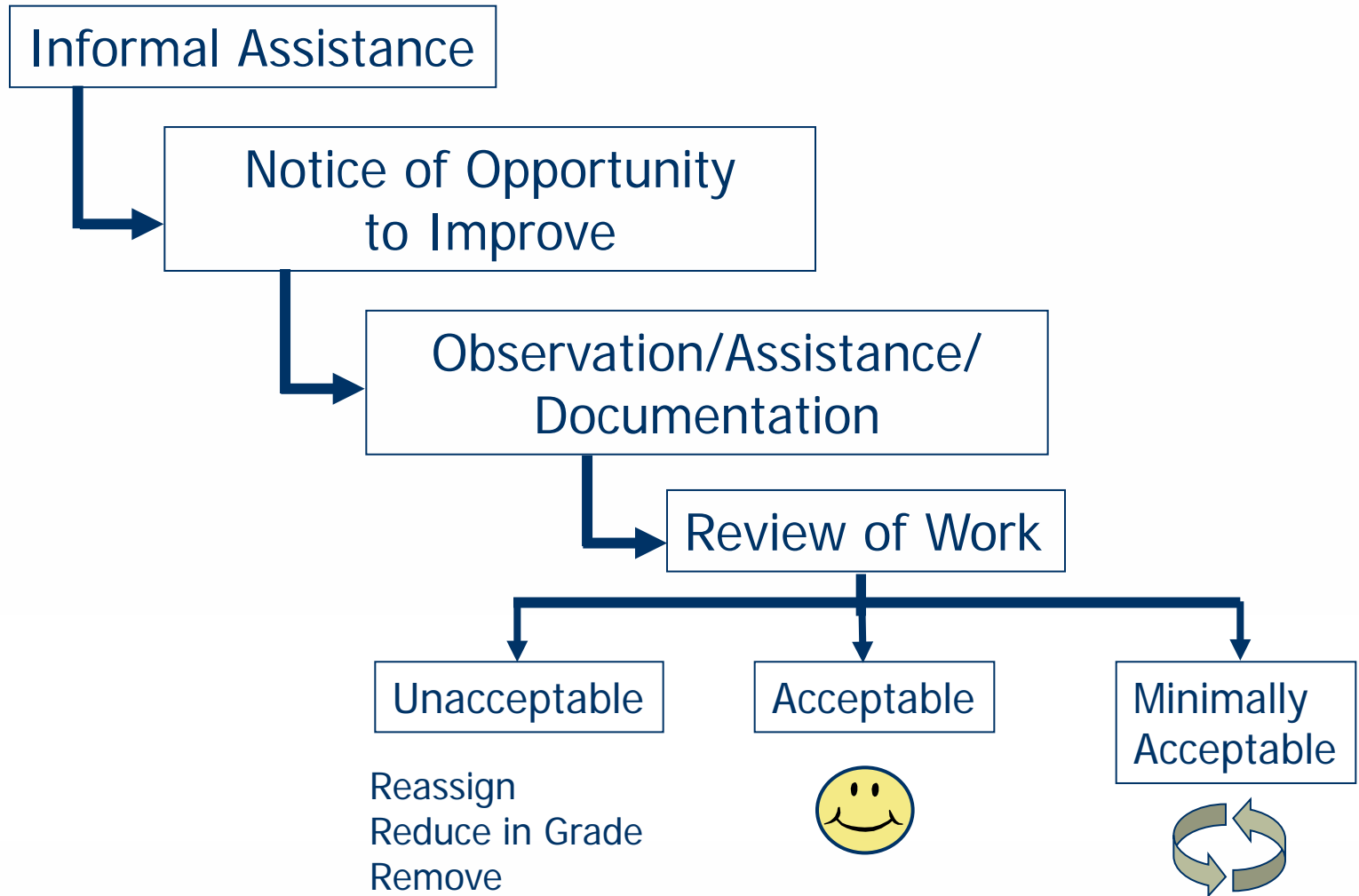
Transition from NSPS

- Summary rating systems:
 - Air Force – two-level (Levels 1 and 3)
 - Army – five-level (Levels 1 through 5)
 - Navy – two-level (Levels 1 and 3)
 - DLA – three-level (Levels 1, 2, and 3)
 - Others?
- Key in procedural issues in 432 actions is element rating scheme – not the summary rating levels

Marginal/Minimal Performance

- 5 CFR 432.103(a) - *Acceptable performance* means performance at a level of performance above “unacceptable” in the critical element(s) at issue
- 5 CFR 430.207(c) – appraisal programs should provide assistance when performance is at the level between Fully Successful and Unacceptable
- If the system contains a Marginal level (Level 2) that is the highest level that the employee can be required to reach in PIP (Jackson-Francis v. OGE (DC-0432-05-0526-1, August 16, 2006)) (Henderson v. NASA (AT-0432-08-0792-I-1, February 2, 2011))

432 Mechanics



MSPB Case Law on Performance Plans

Absolute Standards

- Case law on absolute standards changed!!!!
- Single mistake = unacceptable performance
- Callaway v. Army, (84 FMSR 5870)
 - Secretary removed for failing to meet “one substantiated instance of discourtesy” - action overturned
- Johnson v. Interior, (101 FMSR 5058)
 - Contract Specialist removed under standards that required “timely work, reviewing documents in accordance with policy, communicating effectively” - action overturned

The Saga Continues

- Post Johnson
 - “Weasle words” were added to standards – provided a margin for error
 - “Normally,” “generally,” and “usually” added
- Guillebeau v. Navy (362 F.3d. 1329 (Fed. Cir., 2004))
 - Terms like “never”, “timely”, and “correct” may be used but under most circumstances should not be applied absolutely

Other decisions

■ Backwards standards

- Eibel v. Navy, (857 F.2d 1439 (Fed. Cir., 1988))
- Standards that label unacceptable performance as acceptable fail to inform employee of level needed to be retained – action cannot be sustained
- Wutunee v. Interior, (DE-0432-08-0307-I-1, August 20, 2008)
- Kelly v. Interior, (PH-0432-08-0618-I-1, January 14, 2009)
- MS Standard did not inform employee of what was needed to retain her job – too “wrong” to be fleshed out

Other decisions

- Math is still a problem
 - Impossibly high error rates cannot be upheld
 - Walker v. Treasury, (85 FMSR 5296)
 - GS-4 Accounting Clerk required to meet 99.5% accuracy – in pulling files
 - Percentages require counting all instances or sampling
 - Numbers must be reasonable!



More MSPB Case Law

■ Multiple Components

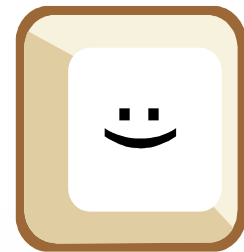
- If a standard includes multiple requirements/ measures/tasks and action is to be taken on one or more of them – all count equally
- Unless employee on notice of the importance of certain of the component(s)
- Shuman v. Treasury, (84 FMSR 5868)

■ Pro-rating

- Annual numerical requirements must be aligned with the duration of the opportunity period
- Brown v. VA, (90 FMSR 5273)

Lessons on Performance Standards

- Standards should describe observable results - not knowledge that someone may possess or his/her personal characteristics
- Use objective standards where there is quantifiable performance - specific numbers, percentages, dates, timeframes, etc.
- Use subjective criteria to measure performance not subject to judgment-free ratings
- Element on courtesy to public is acceptable (5 USC 4302(b)(1))

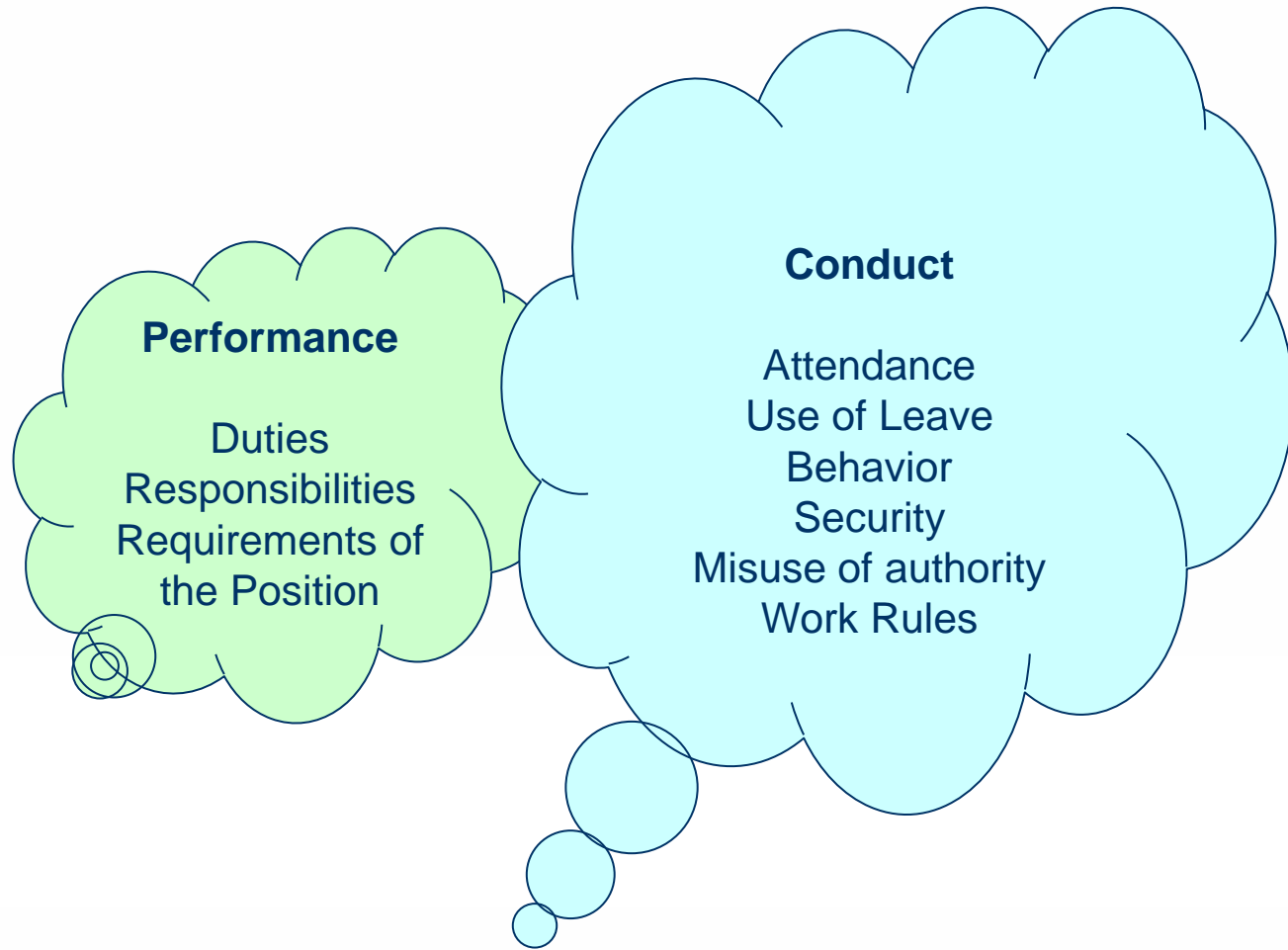


Lessons (cont'd)

- The higher the grade of the job the more subjective the standards may be
- Ensure that the standards meet the definition of the level being described
- Includes those things that the employee has control over
 - Critical element = individual performance
 - Problem areas – e.g., positive comments from customers – leave room for judgment regarding the merits of the comment
- Generic standards work if fleshed out by supervisor

Performance or Discipline?

Performance v. Conduct



Performance v. Conduct (cont'd)

- Performance mechanisms work best when providing direction on performing assignments, meeting responsibilities, learning new tasks, etc.
- Question:
 - If I gave the employee a million dollars to do this task, and he/she still couldn't do it – most likely a performance issue
 - If I gave the employee a million dollars to do this task, and he/she was able to do it – most likely a conduct issue
- What is appropriate response to failure or error?

Is 432 the Right Process?

- Works to teach/reinforce successful performance
- Doesn't fix -
 - Attitude problems
 - Medical problems
 - Employee assistance issues
 - Single errors/lapses that could cause death, injury, breach of security, or great monetary loss

752 - What are the Basics?

- Use progressive discipline
- Prove charge
 - Unacceptable performance
 - Unwilling/unable to perform
- Prove efficiency of service
 - Nexus is simple
 - Reasoned penalty

Douglas Factors

- Douglas v. Veterans Administration, (81 FMSR 7037)
 - Nature and seriousness of offense
 - Job level and type of employment
 - Past disciplinary record
 - Past work record
 - Effect of the offense on ability to perform
 - Consistency of penalty with other actions
 - Consistency of penalty with Table of Penalties
 - Notoriety of offense
 - Clarity with which employee was on notice of rules
 - Potential for rehabilitation
 - Mitigating circumstances
 - Adequacy/effectiveness of alternative sanctions

Standards of Proof

Substantial

- Applies to 432 downgrades, removals, and WGI denials for GS/GM employees
- The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.

Preponderance

- Applies to 752 actions
- The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.



Chapter 752 Case Law

- 752 proper when opportunity period is not advisable
- 752 doesn't require written performance plan or opportunity period, but to prove charge will need to show employee on notice
- PIP not required but is relevant to penalty review (Fairall v. VA, 844 F.2d. 775 (Fed. Cir., 1987))
- 752 can't be used to hold employee to a higher standard than under the performance plan (McGillivray v. FEMA, (93 FMSR 5283))

Unacceptable Performance and NSPS

■ Decisions reported:

- Kim v. DoD, DC-0752-07-0892-I-1
(108 LRP 20622) - removal upheld
 - PFR denied August 1, 2008 (108 LRP 49925)
 - No PIP/no progressive discipline
- Fuller v. Army, DE-0752-09-0145-I-1
(109 LRP 24598) – reassignment & 5% pay decrease upheld
 - Had PIP/no progressive discipline
- Jacks v. Air Force, AT-0752-10-0015-I-1
(110 LRP 37542) – removal upheld
 - Had PIP/no progressive discipline



Initiating Performance Action

When to Begin Action

- Don't hire problems – screening/reference checks
- During probation (432 and 752 procedures do not apply)
- Supervisory probation is different – but deficiencies should be addressed promptly
- As soon as problem manifests itself and normal supervisory intervention is not correcting errors/lapses
- More commonly, new supervisor identifies the problem - or outside issue forces the current supervisor's hand

Prepare the Supervisor

- Be honest about what is involved in an unacceptable performance action - time and effort
- Make sure he/she is dealing with everyone who is not performing
- Explain that he/she is the case
- Have him/her review every sentence in the performance standard(s) to ensure that he/she can explain it



If the Performance Plan is weak

- Vague standards can be fleshed out (Dancy v. Navy, (92 FMSR 5478))
- Elements/standards cannot be rewritten with the issuance of PIP notice – must give employee time to perform to be judged unacceptable under revised plan (Boggess v. Air Force, (86 FMSR 5314))

After an Acceptable Rating . . .

- Create distance
- Easiest with new supervisor who hasn't given an annual rating
- If rating was at a successful level last cycle and performance really hasn't changed . . .
 - Establish what is different
 - Use informal counseling notices/letters of caution

Opportunity Notice Must Include

- Critical element(s) in which performance is deficient
- Standard which must be met to be retained (FS/MS)
- How long the opportunity period will be
- What type of assistance will be provided

Optional Items for PIP Notice

- Employee Assistance Notice
 - If you believe that you may have a personal problem that is affecting . . .
- Medical Documentation Notice
 - If you believe you may have a medical condition . . .
- “If you don’t understand” disclaimer
 - If you have questions, come see me . . .

During the PIP

Extended Leave



- Employee can't be held accountable for performance when not present (Even v. Interior, (84 FMSR 3493))
- Adjustment must be made in either the length of the PIP or deadlines for actions or numbers of actions (Green v. Labor, (85 FMSR 5027))

PIP Considerations

- Opportunity period must be *bona fide*
 - Counseling that berates the individual does not provide required assistance (Zang v. DIS, (85 FMSR 5037))
 - Must have opportunity to perform duties (Sandland v. GSA, (84 FMSR 5871))
- Assistance
 - The type of assistance to be provided may be as simple as closer review and supervision
 - If the notice promises a certain kind of assistance, failure to deliver it is fatal to the case (Adorador v. Air Force, (88 FMSR 5391))

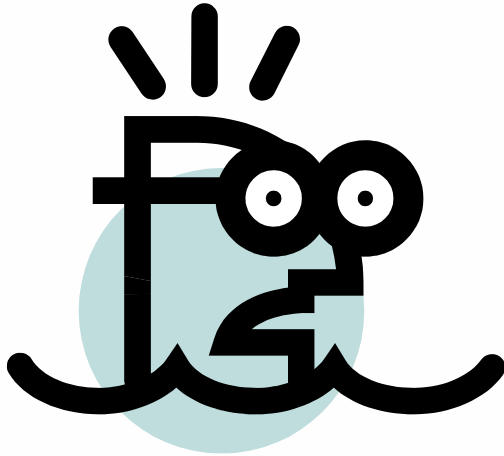
Weingarten and Unacceptable Performance

- No Weingarten right – purpose is not to obtain facts to support disciplinary action which is probable/being considered (5 FLRA No. 53, 8 FLRA No. 72)
- Counseling sessions – no right to representation unless agreed to by agency



At the Conclusion of the PIP

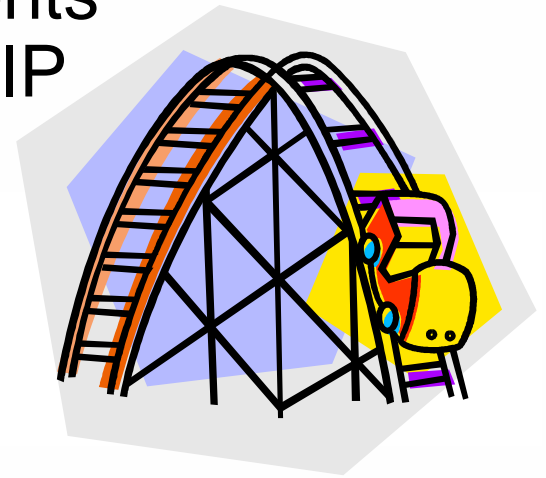
If Performance Improves . . .



- No record of opportunity period is made in Official Personnel Folder
- Keep records on PIP for one year
- If plan includes Marginal level – keep assisting

Roller Coaster Employee

- Term describes an employee who improves during the PIP but then returns to unacceptable level of performance
- Sullivan v. Navy, (90 FMSR 5268) states action may be taken after PIP successfully completed
- Must be based on same elements that were included in original PIP and action on post-PIP performance must be taken within one year of beginning of the PIP



Beware WGI's during actions

- Within-grade increase
 - GS employee must be at acceptable level of competence to receive WGI (5 CFR 531.404(a))
 - FWS employee must be satisfactory or better (5 CFR 532.417(a))
- Harris v Dept of Veterans Affairs (110 LRP 37601) June 29, 2010
 - Employee on PIP 2/15/2006 through 6/2/2006 and judged to be unacceptable – proposed removal
 - Employee accepted “voluntary” change to lower grade
 - Granted WGI on 3/5/2006
 - Remand – agency knew or should have known could not prevail

Notice of Proposed Adverse Action

- Thirty days advance written notice that includes:
 - Specific instances of unacceptable performance
 - Critical element(s) and standard(s) involved
 - Name of official to receive reply and number of days to reply
- Right to representation
- Right to submit medical documentation (required under 432)

Decision Notice

- Written decision which:
 - Is signed by an official higher than the proposer (except head of agency)
 - Specifies the instances of unacceptable performance on which decision is based
 - Considers reply
 - Specifies right to grieve and/or appeal
- Decision must be issued within 30 days of proposal with some exceptions (5 CFR 432.105(b))

Discontinued Service Retirement

- Discontinued Service Retirement (DSR)
 - Employee who ***receives a removal notice*** for unacceptable performance (not misconduct) qualifies (CSRS and FERS Handbook, (CSRS) 44A2.1-9)
 - DSR is **INVOLUNTARY**
 - OPM guidance:
<https://www.opm.gov/settlementguidelines/>
 - Can't settle for clean record: Komiskey v Army, 96 FMSR 5210

Winning on Appeal - 432

- Management carries burden to prove the determination by substantial evidence
- Proof of OPM approval of plan no longer required (see Daigle v. VA, (100 FMSR 5128) - but be prepared to show if issue arises
- Elements and standards must have been communicated – any changes must have communicated and employee had a reasonable opportunity to perform under them
- Must have reasonable elements and standards –
 - Numbers have to be prorated/Sampling is okay

Winning on Appeal – 432 (cont'd)

- Actionable performance tied to position of record
– not a detail or other temporary assignment
- Notification of unacceptable performance
 - Notice must advise employee of level to be reached to be retained (MS or FS) (Donaldson v. Labor, 85 FMSR 5194)
- Reasonable opportunity to improve

Winning on Appeal – 432 III

- Satisfy procedural requirements of Chapter 43 and any agency/union contract requirements
- Direct evidence of failure to meet the FS/MS standard
 - Documentary evidence
 - Testimony



Winning on Appeal - 752

- Management carries burden to prove the determination by a preponderance of evidence
- Formal performance plan need not have been communicated but employee must be on notice of performance requirements
- Must have reasonable requirements
- PIP not necessary

Winning on Appeal - 752

- Satisfy procedural requirements of Chapter 75 and any agency/union contract requirements
- Direct evidence of failure to meet requirements
 - Documentary evidence
 - Testimony
- Efficiency of the service
 - Nexus
 - Reasonable and reasoned penalty – Address Douglas

References and Tools

■ 5 CFR

- 430 – performance management
- 432 – unacceptable performance
- 531 – pay (white collar within-grades)
- 532 – pay (prevailing rate within-grades)
- 752 - discipline

■ Agency performance plan

■ Delegation of authority to take corrective action

■ Union agreement

■ OPM Website on Poor Performance

- <http://www.opm.gov/er/performance.asp>

Contact

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